SUPREME COURT, U. S.

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No. 506

In the Supreme Court of the United States

OCTOBER TERM, 1961

WILLMUT GAS AND OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION AND UNITED GAS PIPE LINE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a–9a) is reported at 294 F. 2d 245. The orders of the Federal Power Commission (R. 51–53, 68) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1961. The petition for a writ of certiorari was filed on October 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

An increased rate filed by a natural gas company was suspended for the statutory five-month period by the Federal Power Commission, and hearings were instituted on its lawfulness. After these increased rates had gone into effect upon the expiration of the suspension period but before the hearings were completed, the company filed a further increase in rates. On these facts, the questions presented by the petition are:

1. Whether the Commission is required automatically to reject the second increased-rate filing; and

2. Whether the filing and taking effect of the second increase in rates deprives the Commission of jurisdiction to complete the hearings on the first increase and to order refunds if it finds that the rate was not justified.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act are set forth in petitioner's Appendix C at pages 15a–20a.

STATEMENT

Petitioner, a distributing company purchasing natural gas from United Gas Pipe Line Company, seeks review of a decision of the Court of Appeals for the District of Columbia Circuit, holding that United was entitled to file increased rates even though the

[1] Should certiorari be granted, we reserve the right also to argue, as we did below, that review was premature because the Commission did not, by ordering a hearing, act on petitioner's motion to reject the filing of those rates. We also reserve the right to argue that petitioner is not a "party" entitled to review of the challenged order under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), because of its failure to seek intervention in the rate proceeding until after denial of its motion for reconsideration of the challenged order, see p. 4, *infra*.

Commission had not concluded hearings with respect to earlier increased-rate filings.

On February 23, 1960, petitioner filed a motion with the Commission to reject increased rates tendered for filing by United on February 11, 1960, or, alternatively, if those rates were permitted to be filed, to disallow United's earlier increased rates as to which hearings had not been concluded (R. 26). These earlier increased rates had been filed by United on September 30, 1955, May 15, 1956,[2] May 29, 1957, May 29, 1958, and March 30, 1959 (Pet. App. 3a). The Commission suspended each of these increased rates (except those for industrial resale only which are not subject to suspension[3]) for the statutory five-

[2] Hearings on the rates filed on September 30, 1955, began on February 6, 1956, and concluded October 31, 1956; hearings on the rates filed May 15, 1956, began July 13, 1956, and ended April 9, 1957. Several weeks after the opening of the first hearing, this Court rendered its decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, holding that a natural gas company could not escape an obligation to provide gas at a specified contract price by unilaterally filing an increased rate pursuant to Section 4 of the Natural Gas Act. Thereupon, a number of United's customers who were interveners in the Commission proceedings (including the present petitioner) filed motions to reject United's filings, relying on the *Mobile* decision. The Commission denied these motions, the court of appeals set aside the Commission's order, but this Court affirmed the Commission's action. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103. The presiding examiner then resumed consideration of the merits of the first two increased rate filings and issued a 141-page initial decision on April 5, 1960, which the Commission adopted, with modification, on January 4, 1961 (Pet. App. 3a).

[3] Section 4(e) expressly states that such rates may not be suspended.

months' period and set them down for hearing to determine their lawfulness (Pet. App. 3a). After the respective suspension periods, the various rates became effective subject to an obligation to refund any portion of the rates found not justified by the Commission.

On March 10, 1960, the Commission ordered a hearing on the rates filed on February 11, 1960, and, except for those relating to industrial resales only, suspended their effectiveness for five months (R. 51–53). The Commission's order, which was the subject of the proceedings below, recited that comments had been received from ten customers and two State Commissions either objecting to the proposed rates, indicating an intention to intervene, or requesting an investigation to ascertain if the increased rates were justified. In a footnote, the Commission stated that petitioner had filed a petition to reject the increased rate filing, but the Commission did not expressly rule on that request (Pet. App. 4a). Petitioner filed a petition for rehearing on April 8, 1960, which was treated as a motion for reconsideration and denied on May 5, 1960 (R. 53–68). Thereafter, on May 6, 1960, petitioner filed a petition to intervene in the Commission proceedings on the increased rates (R. 69–70).

On petition for judicial review of the Commission's March 10, 1960, order, the court below unanimously affirmed,[4] holding, *inter alia,* that Commission juris-

[4] The court noted a number of suggestions (including those referred to in note 1, *supra*) that Willmut's petition should be dismissed for lack of jurisdiction, but chose to resolve them

diction to determine the lawfulness of an increased rate is not lost merely because the natural gas company files another rate increase. The court also held that the Commission had not abused its discretion in permitting the filing of the increased rates tendered by United on February 11, 1960.

ARGUMENT

Petitioner contends that the Commission must reject an increased-rate filing under Section 4 of the Act (Pet. App. 16a) if the rate which it would supersede is then subject to a Section 4 hearing. It rests this contention principally on the ground that otherwise the Commission would be divested of jurisdiction over the superseded rate.[5] As we show below, the view that acceptance of a new rate for filing results in a divestiture of Commission jurisdiction over rates being collected subject to refund is without foundation. Moreover, there is no conflict (Pet. 5–8) between the decision in this case and that in *Amerada Petroleum Corporation* v. *Federal Power Commission*, 293 F. 2d 572 (C.A. 10), petition for certiorari pending, No. 564, this Term. On the issues before it in this case, the lower court's affirmance of the Commission's order was clearly correct, and no further review is warranted.

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in Willmut's favor without passing on them specifically (Pet. App. 4a–5a).

[5] As an alternative remedy to rejection of the last filing, but for the same reasons, it argues that if the superseding rate is accepted for filing the earlier, pending filings must be dismissed and refunds ordered.

1. In support of its position that acceptance of an increased rate for filing divests the Commission of its power to order refunds with respect to a then-effective rate still under investigation, petitioner argues that the rate collected during a locked-in period (*i.e.*, a period terminated by the taking effect of a superseding rate) is a past rate, and thus the Commission can order no refund since it has no reparations authority. See, *e.g.*, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246. But while Congress did not grant the Commission power to award reparations, it did give it the power in Section 4(e) of the Natural Gas Act (Pet. App. 17a–18a) to order refunds with respect to increased rates that become effective after suspension, pending completion of a hearing as to their lawfulness. It is obvious, therefore, that the lack of reparations power does not mean that the Commission has no power to redress the collection of excessive rates received while their lawfulness was being determined, for any refund under Section 4(e) has the effect of retroactively reducing the rate involved. This is true whether the rate collected in the past is still in effect, so that the Commission also orders it reduced prospectively, or whether, as here, the rate has in the interim been changed so that a different rate (whose lawfulness remains to be determined in another later proceeding) is now being collected, leaving only the question of refund of the locked-in rate to be determined in the earlier proceeding. In either event, the refund relates to a rate collected in the past. It is thus clear that pe-

titioner's argument would nullify the entire refund power of Section 4(e).

There is, of course, no inconsistency between the Commission's lack of reparations authority and its possession of a power to order refunds. In choosing not to give the Commission power to award reparations, Congress apparently acted in the belief that such power would encourage wholesale customers to delay complaining about rates until it would no longer be feasible to pass the benefit of reparations payments on to the ultimate consumer. See S. Rep. No. 621, 74th Cong., 1st Sess., 20; Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess., p. 1685. The refund provision, on the other hand, which permits the ultimate disallowance of any part of the challenged rate as of the time it took effect, provides an incentive for the immediate raising of any challenge to the new rate, and, coupled with the provision of Section 4(e) placing the burden of justifying the increased rate on the seller, encourages cooperation in bringing about the early disposition of the proceeding. As Mr. Justice Frankfurter points out in his dissenting opinion in the *Montana-Dakota* case, *supra,* consumers were considered adequately protected by the power to grant prospective relief generally and the additional power in increased-rate proceedings to order refunds. 341 U.S. at 258.

The Commission has consistently construed the Section 4(e) refund power as continuing where the

rates under investigation have been superseded and the refund relates to a past period only. In such circumstances its regular practice where it finds the increased rate unlawful has been to order refunds for the locked-in period. See the compilation of 70 such orders in Appendix A to the Brief in Opposition filed in this case by United Gas Pipe Line Company.[6] Such consistent Commission interpretation and practice is entitled to great weight. See, *e.g.*, *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 314-315; *United States* v. *Public Utilities Commission*, 345 U.S. 295, 314–315.[7]

2. Petitioner's further contention (Pet. 21) that, even if the Commission has jurisdiction to determine the lawfulness of the rate in a proceeding involving

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[6] It should be noted that until the late 1940's the number of Section 4 increased-rate proceedings was small. Most of the pipeline rate cases prior to that time were Section 5 proceedings relating to existing rates. Accordingly, the number of successive increased-rate filings which became effective subject to refund was not significant before that time.

[7] It is significant that various courts have reviewed rate orders relating to the locked-in period without any suggestion being made that the Commission lacked jurisdiction to order refunds. See, *e.g.*, *State Corporation Commission* v. *Federal Power Commission*, 206 F. 2d 690 (C.A. 8), certiorari denied, 346 U.S. 922; *Michigan Wisconsin Pipe Line Co.* v. *Federal Power Commission*, 263 F. 2d 553 (C.A. 6); *El Paso Natural Gas Co.* v. *Federal Power Commission*, 281 F. 2d 567 (C.A. 5), certiorari denied *sub nom. California* v. *Federal Power Commission*, 366 U.S. 912; *Wisconsin* v. *Federal Power Commission*, C.A.D.C., Nos. 16175, 16177, 16180, decided November 30, 1961 (slip opinion, pp. 4, 9, 11-12).

a locked-in period only, acceptance for filing of a superseding increase would nullify in advance the order to be issued in the earlier proceeding rests on the same mistaken view that such an order can only fix the rate to be collected in the future.

Moreover, the fact that the superseding rate may be higher than the rate ultimately found reasonable for a past period does not in itself mean that it must be rejected in order to accomplish the protection of consumer interests intended by the Act. If the superseding rate reflects increases in the cost of providing the service (cf. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103, 113) it is no more than reasonable to permit it to be filed. If, on the other hand, it is predicated even in part on purported cost justifications that are determined to be invalid in the proceeding relating to the past period, the Commission should be, and we believe is, free to give immediate effect to such determinations by an interim partial rate reduction in the new rate proceeding, as soon as that is determined, without awaiting full investigation and hearing on other aspects of the case. *State Corporation Commission* v. *Federal Power Commission,* 206 F. 2d 690, 715–716 (C.A. 8), certiorari denied, 346 U.S. 922; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 236 F. 2d 606 (C.A. 3).[8] See petition for certiorari filed on December 8, 1961, in *Federal Power Commission* v. *Tennessee Gas Transmission Co.,* No. 591, this Term.

[8] Petitioner's reliance (Pet. 17) on these cases to support its view that the Commission may reject filings is misplaced. In both, the Commission's action was based upon a full hearing on the issues decided.

3. The foregoing discussion demonstrates the lack of foundation for the legal premises underlying petitioner's position that the Commission must reject any increased rate that would supersede a rate still subject to a Section 4(e) hearing. Moreover, while the Commission is sympathetic to petitioner's view (Pet. 20) that the preservation of the financial integrity of natural gas companies does not require that such companies be able to file new increased rates every six months, it cannot agree that rejection of any increase in rates so long as the Commission has not concluded its hearing on the existing rates, regardless of the duration of that hearing or the bases for those rates, is an appropriate remedy. The Commission does, however, believe that some remedial legislation with respect to successive increased-rate filings would make rate regulation more effective. Accordingly, in its annual report for fiscal year 1961, which will soon be submitted to the Congress, the Commission is requesting legislation that would authorize it to extend the time of suspension of a proposed change in a currently-effective rate schedule for a period of six months beyond the original five-month period of suspension.

4. No conflict exists between the decision in this case and that of the Tenth Circuit in *Amerada Petroleum Corp.* v. *Federal Power Commission, supra.*[9] Although petitioner recognizes (Pet. 7) that the cases are factually different because the increases involved in the *Amerada* case were filed during the five-month

[9] The opinion in the *Amerada* case is set forth at Pet. App. 10a.

period of suspension of the preceding increased-rate filing, while here the superseding increases were filed after the rates had become effective, it sees a conflict in result. This is because of its view that "neither Court treated suspension *vel non* as material" (Pet. 7). This statement is plainly incorrect. The *Amerada* decision clearly shows (1) that the Commission action was expressly based on its interpretation of the Act as meaning that "during the suspension of a rate, the prior existing rate schedule continues in effect and shall not be changed" (Pet. App. 14a), and (2) that the court's affirmance was based on approval of this long-standing and consistent interpretation, which has been published in the Commission's Rules of Practice and Procedure. See 18 C.F.R. 2.4(f) and 2.52.

Thus, far from ignoring the suspension provision, the *Amerada* decision rests squarely on the conclusion that the Commission may reject rate filings that would alter the status quo intended to be preserved by suspension. While petitioner quotes language (Pet. 7–8) from the *Amerada* case to the effect that the Commission has broad administrative powers under Section 16 of the Act, the sentence following the passage quoted shows that such powers were exercised there only to implement the statutory provisions applicable to rate increases during the period a preceding rate increase was under suspension. Approval of such a use of Section 16 is in no way inconsistent with the court's view here that the Commission need not employ its administrative powers to

prohibit the filing of rate increases while a hearing on a previous increase then in effect is still pending. For the court below was of the opinion that in the present case such an administrative prohibition would be inconsistent with the applicable provisions of the Act as it construed them. In interpreting the Act it considered only the case before it, involving a filing after the end of the suspension of the preceding increase. It had no occasion to consider the special problem of the *Amerada* case—a superseding rate filing during the period of suspension of the preceding rate filing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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